Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	MB Docket No. 10-71
Related to Retransmission Consent	)	

To: The Commission

Comments of Morgan Murphy Media

Morgan Murphy Media ("Morgan Murphy"),[1] by counsel, responds to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking ("NPRM") regarding proposed changes to the Commission's retransmission consent rules.[2] The Commission seeks comment on "a series of proposals to streamline and clarify" the rules and the negotiations process for retransmission consent. The NPRM seeks to "reexamine" the rules relating to retransmission consent due to marketplace changes where "disputes over retransmission consent have become more contentious and more public" and where there has been "a rise in negotiation impasses that have affected millions of consumers."[3] Morgan Murphy believes that the marketplace is working as Congress intended; a few high-profile cases cannot justify radical changes to the retransmission consent rules. These rules benefit consumers by facilitating broadcast localism, by fostering programming diversity and by ensuring fair compensation for the costs of producing local programming.

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[1] Morgan Murphy Media includes: Television Wisconsin, Inc. (WISC-TV, Madison, WI), QueenB Radio Wisconsin, Inc. (WPVL[AM] & WPVL-FM, Platteville, WI; WGLR[AM] & WGLR-FM, Lancaster, WI; KIYX-FM, Sageville, IA), Spokane Television, Inc. (KXLY-TV, Spokane, WA); QueenB Radio, Inc. (KZZU-FM, Spokane, WA; KEZE-FM, Spokane, WA, KXLY[AM] & KXLY-FM, Spokane WA; KHTQ [FM], Hayden, ID; KVNI [AM], Coeur d'Alene, ID; KXLX[AM], Airway Heights, WA), Apple Valley Broadcasting, Inc. (KAPP[TV], Yakima, WA, KVEW[TV], Kennewick, WA), and QueenB Television, LLC (WKBT[TV], La Crosse, WI).
[2] Notice of Proposed Rulemaking, *Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10-71 (rel. Mar. 3, 2011).
[3] *NPRM* at ¶2.

Background

For almost 70 years, Morgan Murphy, like other broadcasters, has taken great pride in its commitment to community service and local broadcasting. In small- and medium-sized markets in Washington, Wisconsin, Idaho and Iowa, Morgan Murphy stations have fulfilled broadcasting's core mandate as a local outlet of news and information providing breaking news and information about local emergencies such as floods and fires. As the *sine qua non* of the broadcaster's mission, localism[4] distinguishes broadcasting from all other outlets for news and information, whether provided via the Internet, by Multichannel Video Programming Distributors ("MVPDs")[5] or by other means. To date, broadcast localism has been a key Commission mandate:

> The Commission has consistently held that, as temporary trustees of the public's airwaves, broadcasters are obligated to operate their stations to serve the public interest—specifically, to air programming responsive to the needs and issues of the people in their communities of license. ... [O]ur broadcast regulatory framework is designed to foster a system of local stations that respond to the unique concerns and interests of the audiences within the stations' respective service areas.[6]

Quality local programming that responds to these "unique concerns and interests" does not pay for itself. Instead, the combination of retransmission consent, network nonduplication and syndicated exclusivity permits broadcasters to obtain fair compensation for local

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[4] As the Commission stated in its *Report on Broadcast Localism*, the Commission has long recognized that "every community of appreciable size has a presumptive need for its own transmission service" and that the Supreme Court has stated that "[f]airness to communities [in distributing radio service] is furthered by a recognition of local needs for a community radio mouthpiece." *Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, MB Docket No. 04-233, FCC 07-218 (rel. Jan. 24, 2008) at ¶5 (citations and footnotes omitted) ("*Localism Report*").

[5] The FCC defines MVPDs as including all entities that "make available for purchase multiple channels of video programming," including incumbent cable operators, DBS, home satellite dishes, broadband service providers, local exchange carriers, open video systems, electric and gas utilities, wireless cable systems, private cable operator systems, commercial mobile radio service and other wireless providers. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Further Notice of Inquiry, MB Docket No. 07-269 (rel. Apr. 21, 2011) ("*Video Programming NOI*").

[6] *Localism Report* at ¶6 (citations and footnotes omitted).

programming. [7] These rules prevent MVPDs from thwarting such efforts by importing distant out-of-market signals – efforts that are antithetical to localism.

Free, over-the-air broadcasting still occupies a critical role in keeping local communities informed. Consumers value and demand broadcast programming, whether delivered over the air or via nonbroadcast delivery systems such as cable, satellite and broadband networks. Digital television broadcasts offer high-quality video and audio transmissions compared to many alternatives. In times of emergency and local crises, broadcasters provide critical sources of news, information and local coverage. Moreover, while many Americans view broadcast programming as part of packages of linear programming offered by MVPD services, there are increasing reports of consumers choosing not to subscribe to video from an MVPD but instead viewing video content online (through over-the-top and other providers) as well as via free, over-the-air broadcasting.[8] The rise of over-the-top video services, and the competitive role they play in the marketplaces for video programming, has gotten the Commission's attention.[9] As mobile DTV technology improves, broadcasters will seek to leverage their significant investments in DTV equipment – as mandated in the Commission's DTV transition, which concluded less than two years ago – into new mobile DTV applications, more multicast channels with linear programming streams and other forms of competition with MVPD services.

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[7] The Commission previously stated that its rules for retransmission consent, network nonduplication, syndicated exclusivity and sports blackouts are "part of a mosaic of other regulatory and statutory provisions ... to implement key policy goals." Report to Congress, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (rel. Sept. 8, 2005) at 18.

[8] *See. e.g.,* Harris Interactive, "Cutting the Cord With Your Cable Company" (May 11, 2011)(available at http://www.harrisinteractive.com/Insights/Blogthehighway/tabid/615/EntryId/71/Cutting-The-Cord-With-Your-Cable-Company.aspx).

[9] *See. e.g., Video Programming NOI* at ¶¶52-55.

Despite the fact that broadcast programming remains very popular with consumers, many competitors hope to bury broadcasting.[10] They would relegate some or all of the broadcasting service to the scrap heap and would support strip-mining of broadcast spectrum for other technologies. Sound policy involves making wise choices among potential alternatives and about rationalizing potential tradeoffs. Morgan Murphy believes that if the cost of increasing spectral efficiency in the broadcast bands is the derogation of broadcast localism, that cost is too high for consumers to bear. Localism policies remain as important to consumers as they are costly for broadcasters to implement in a sharply competitive marketplace against competitors who are not subject to the same obligations. As Morgan Murphy has previously noted:

> broadcasters continue to fulfill a critical role in the industry by providing programming that is compelling, popular and, most importantly, *local.* In this context, retransmission consent fees are vital to the ongoing viability of many broadcast stations. Retransmission consent fees help broadcasters obtain fair compensation for the value of the content that broadcasters provide for consumers. They help offset the costs of creating high-quality programming, and they bring two measures of parity – first, parity to MVPDs who charge fees to their subscribers directly and second, parity to other nonbroadcast video programming providers who negotiate fees for carriage on MVPD systems. The fees charged by these MVPDs and other nonbroadcast video programming providers are *in addition to* the advertising revenue they collect as they compete with broadcasters. Retransmission consent is especially important in small-to-medium-sized markets, where the small available advertising revenue is subject to growing levels of competition from MVPD systems, other nonbroadcast video and web-based new media.[11]

It is no coincidence that the recent push by MVPDs and others for changes in the retransmission consent ground rules coincides with the proliferation of new competition in the video marketplace. Such competition has driven MVPDs to begin providing fair compensation to

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[10] *See, e.g., If a TV Station Broadcasts in the Forest*, Thomas W. Hazlett (May 19, 2011) (study commissioned by the "American Television Alliance," a group whose members include MVPDs, programmers and others).

[11] *See* Comments of Morgan Murphy Media in *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket Nos. 10-71, 07-198 at 3.

creators of popular broadcast programming – programming that comprises a substantial portion of the value of their MVPD programming service to consumers.

Argument

I. ANY CHANGES TO THE GOOD FAITH NEGOTIATION REQUIREMENTS MUST NOT UNDERMINE PARTIES' FREEDOM OF CONTRACT

The Commission seeks comment regarding whether certain actions or practices should be deemed *per* se violations of the Commission's good-faith rules. The current system promotes freedom of contract, and negotiations should be expected to involve significant give and take, even within the bounds of good faith negotiations. The current process limits the Commission's "referee" role except in the most difficult circumstances, consistent with Congressional intent.[12] Broadcasters and MVPDs are obliged, by statute, to negotiate retransmission consent in good faith.[13] All sides have strong incentives to avoid service disruptions, and usually these incentives play out in the marketplace. As the Commission acknowledges, there have been few complaints of good faith violations adjudicated at the Commission.[14] Such negotiations are bounded by a series of objective standards, as well as precedent of labor law. Morgan Murphy agrees that the Commission lacks authority to provide for mandatory interim carriage[15] or for mandatory binding dispute resolution procedures.[16]

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[12] *See, e.g., Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 15 FCC Rcd 5445, 5448-50 (2000) ("Good Faith Order") (noting that Congress did not intend to subject retransmission consent to detailed substantive Commission oversight but rather intended that the Commission follow established precedent, such as in labor law, in implementing the good faith retransmission consent requirement) at ¶13, *recon. granted in part*, 16 FCC Rcd 15599 (2001).

[13] 47 C.F.R. §76.65.

[14] *See, e.g., NPRM* at 12.

[15] The Commission in 2005 rejected calls to prohibit broadcasters from withdrawing consent while negotiations were pending or during the pendency of a good faith or exclusivity complaint, finding that based on "the express language [of the statute], we see no latitude for the Commission to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission." Good Faith Order at ¶60.

[16] *NPRM* at ¶¶18-19.

In the real world, not every negotiation results in an agreement. The NPRM identifies some recent, high-profile instances of service disruptions where broadcasters and MVPDs failed to reach a retransmission consent agreement. The Commission notes, correctly, that there "have been very few complaints filed alleging violations of the Commission's good faith rules."[17] Apparently this limited precedent is grounds for adopting new sweeping "objective" standards for good faith. Morgan Murphy urges the Commission to be judicious in adopting any new objective "good faith" standards and to avoid the temptation to treat cases at the margin – where hard bargaining and leverage reach their apogee in competitive marketplaces – as grounds for overinclusive rules of general applicability.

At present, there are seven "objective" standards whereby a negotiating entity can be found to lack good faith:

- Refusal to negotiate;
- Refusal to designate a representative with authority to make binding representations on retransmission consent;
- Refusal to meet and negotiate at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations;
- Refusal to put forth more than a single, unilateral proposal;
- Failure to respond to the other party's retransmission consent proposal;
- Execution of an agreement with any party that prohibits entry into a retransmission agreement with any other broadcast station or MVPD; and
- Refusal to execute a written retransmission consent agreement that sets forth the full understanding of the television broadcast station and the MVPD.[18]

In the NPRM, the Commission asks whether certain practices should be considered *per se* violations of the obligation to negotiate in good faith, such as:

- When a station agrees to give an affiliated network the right to approve a retransmission consent agreement or to comply with such an approval provision;
- When a station grants another station (or station group) the right to negotiate or the power to approve retransmission consent (e.g., in LMAs, JSAs, shared services agreements);

[17] *See, e.g., NPRM* at ¶12.
[18] *See* 47 C.F.R. §76.65(b)(1).

- Refusal to put forth *bona fide* proposals on important issues;
- Refusal to agree to non-binding mediation when the parties reach an impasse within 30 days of expiration of the retransmission consent agreement (note: FCC believes it has authority to require non-binding mediation);
- Unreasonable delay in retransmission consent negotiations (with the NPRM request comment on how "unreasonable" should be defined);
- A broadcaster requests or requires as a condition of retransmission consent that an MVPD not carry an out-of-market "significantly viewed station"; or
- Other actions or practices (e.g., repeated insistence on month-to-month retransmission consent agreements, new agreement terms of less than one year, required inclusion of MFN clause in a retransmission consent agreement).

In Morgan Murphy's view, the Commission should maintain its sharply limited role in these matters, as Congress intended. Rather than yielding to the temptation of regulatory creep, the Commission should allow contracting parties the freedom necessary to negotiate retransmission consent, subject to existing laws. Contracting parties should be able to negotiate with affiliated networks or other stations/station groups and to give them a say in retransmission consent deals because they too have a stake in the outcome.

Further, some of the Commission's so-called "objective standards" are inherently problematic because they are nothing of the sort. For example, whether a proposal is "bona fide" or whether a delay is "unreasonable" must be determined by reference to inherently subjective standards and context. This has little if anything to do with "good faith" standards. These "objective" standards don't offer clarity; they offer new opportunities to game the Commission's enforcement mechanisms. That's not to say that Morgan Murphy supports the use of non bona fide proposals or unreasonable delay; rather, these proposed "objective" standards offer nothing that is not already covered by the existing "good faith" rules.

II. THE COMMISSION SHOULD AVOID UNDULY ALARMIST AND UNNECESSARY "NOTICE" REQUIREMENTS

The Commission seeks comment on proposals to provide advance notice to consumers to "require that notice of *potential* deletion of a broadcaster's signal be given to consumers once a retransmission consent agreement is within 30 days of expiration, unless a renewal or extension has been executed and regardless of whether the station's signal is ultimately deleted."[19] Morgan Murphy believes that such notices would be unduly alarmist, confusing and unnecessary. In many cases retransmission consent renewals, extensions or replacement contracts happen shortly before applicable deadlines – well within the 30-day window, but still in a timely manner. As a result, there is great potential "for causing unnecessary anxiety to consumers,"[20] especially in the vast majority of cases where that notice ultimately would become moot once the parties enter into a new agreement. In addition, Morgan Murphy believes that the Commission's narrow role in retransmission consent means that the Commission should leave the content of required notices to the parties, subject to existing requirements that the notices not be false or misleading.

III. IF LOCALISM IS TO BE RETAINED, NETWORK NONDUPLICATION AND SYNDICATED EXCLUSIVITY PROVISIONS ALSO MUST BE RETAINED

The Commission seeks comment on the "potential benefits and harms of eliminating the Commission's rules concerning network non-duplication and syndicated programming exclusivity, without abrogating any private contractual provisions."[21] The Commission is not seeking to eliminate these protections, which in the absence of Commission rules still may be provided in network-affiliate contracts and retransmission consent agreements. Instead, the Commission's proposal would have two primary effects: 1) eliminating the means for parties to enforce network non-duplication and syndex rights before the Commission, rather than through

[19] *NPRM* at ¶37 (emphasis in original)
[20] *Id.* at ¶34.
[21] NPRM at ¶42.

the courts, and 2) eliminating the territorial restrictions on the exercise of these rights by broadcasters.

Under Commission rules, any network non-duplication and syndicated exclusivity rights are conferred via private contractual arrangements and are enforceable by the Commission. By prohibiting MVPDs from importing distant signals in circumvention of these exclusivity rights, the exclusivity rules promote localism by prohibiting the importation of out-of-market network signals in those markets where a broadcaster has bargained for these rights. These programming protections must be available as well; accordingly, even if such rules were to be eliminated, the Commission should clarify that programmers must not be prohibited from granting exclusivity as a matter of contract.

With respect to eliminating an avenue for enforcement at the Commission, Morgan Murphy believes that the Commission is better suited to adjudicate specific disputes than a patchwork of courts nationwide. These exclusivity rules are creatures of federal policy, and the Commission can promote predictability and consistency in interpretation of the rules by retaining the rules. The only real "regulatory intrusion" that the Commission has is the territorial zones of protection, which may be narrower than what would otherwise be provided by contract. If the Commission were to harmonize its protections with those negotiated in the private marketplace, but retain a role in adjudicating disputes, that would be beneficial. Accordingly, Morgan Murphy believes that the Commission should not eliminate the network nonduplication rules and the syndicated exclusivity rules but rather should harmonize them with the rights that broadcasters and programmers negotiate in the marketplace.

Conclusion

For the above-stated reasons, Morgan Murphy urges the Commission to advance federal policies to promote free over-the-air broadcasting and local programming by continuing to regulate with a light touch, as Congress intended, in matters involving retransmission consent negotiations. Freedom of contract should remain paramount, and the record fails to provide any grounds sufficient to justify significant changes to the retransmission consent regime. To the contrary, consumers in the small-to-medium sized markets, such as those served by Morgan Murphy, benefit from the current retransmission consent, network nonduplication and syndicated exclusivity rules, all of which promote localism.

Respectfully submitted,

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